

**“Understated APR”**

1. *What is meant by “actual APR” and “annual percentage rate calculated in accordance with the Act,” as used in the Policy Guide?*

Those terms mean the lowest permissible APR that can be computed, applying all applicable provisions of Regulation Z.

**De Minimis Rule**

1. *How should the de minimis rule be applied in closed-end credit transactions?*

The de minimis rule should always be applied to the amount of the adjustment calculated under the “lump sum method” of reimbursement as of the maturity date of the transaction, regardless of which reimbursement method is ultimately used by the creditor.

2. *How should the de minimis rule be applied in open-end credit transactions?*

The de minimis rule should be applied to the total amount of the adjustment calculated for each consumer’s account under the “lump sum method” for the period of time from the date of the current examination back to the date of the first occurrence of the violation. However, the total time period may not exceed the two-year period prior to the date of the current examination.

**Corrective Action Period**

1. *Have the agencies changed their position on the time period required for taking corrective action for violations involving closed-end credit?*

Yes. Prior to 1997, the agencies took the position that the statutory phrase “immediately preceding examination” (which serves as the cutoff date for retroactive application of a reimbursement requirement) referred to the most recent examination (prior to the current examination) in which compliance with Regulation Z and the Act was reviewed. Because of decisions reached by the Eighth and Eleventh Circuits of the United States Courts of Appeal, the agencies have adopted a new policy. The agencies by policy now interpret the phrase “immediately preceding examination” to mean an examination of any type conducted for any purpose by a federal regulatory agency with designated administrative enforcement responsibility under the TILA. However, supervisory visitations, inspections, or other reviews that are not considered examinations by the agencies are not considered examinations for purposes of applying retroactivity limitation. In addition, an examination of an affiliated entity, such as an operating subsidiary or an institution’s holding company, is not considered an examination for purposes of determining the corrective action time period under the Act.

2. *What is the effective date of the new policy change regarding the time period for corrective action for violations involving closed-end credit?*

The policy change regarding the corrective action time period was effective as of August 7, 1997.

3. *Can an institution terminate the remainder of its restitution obligation to a borrower in light of this change in policy?*

No. The policy change applies to future and pending cases as of the effective date. There will be no change in reimbursement obligations arising in connection with restitution cases that have been previously resolved. Once the institution makes its decision about the restitution method that it will pursue, it is expected to complete its obligations to affected borrowers as agreed.

For example, under the “Lump Sum/Payment Reduction” method of reimbursement, an institution remits to the borrower a lump sum covering excess money paid to the point that restitution is made, and then reduces future payments to cover the remaining restitution obligation. Under the new policy, the agencies will not permit the institution to terminate its remaining restitution obligation by increasing the borrower’s payments to the level they were prior to the restitution action.

4. *How will the agencies apply the policy change when “concurrent” examinations are being conducted at a financial institution?*

Concurrent examinations occur when several different types of examinations begin on the same day or when examinations begin in succession. Concurrent examinations may also begin several weeks or months apart but within the same examination cycle, based on factors such as the availability of working space for the examination teams, or the expressed preferences of the institution’s management.

For purposes of applying the policy change regarding the corrective action time period, the agencies consider a concurrent examination to be one event. Assume, for example, the situation where a safety and soundness examination begins on Monday, a trust examination begins on Tuesday, and the compliance examination starts on Wednesday. Assume further that the compliance team identifies a pattern or practice of violations triggering the restitution provisions of the Act. The agencies will consider the immediately preceding examination to be the last completed examination, not the trust examination that began on Tuesday, or the safety and soundness examination that began on Monday.

Similarly, assume an institution’s examination is to be conducted in succession, meaning that the compliance examination would begin after the safety and soundness and/or trust examination on site work in the institution is completed, which could be several months after the start date of the concurrent examination. The agencies will consider those concurrent examinations to be part of the same examination cycle for purposes of the policy.

5. *Does the policy change limit or otherwise affect the corrective action time period where a practice identified at a prior examination is not corrected by the date of the current examination?*

No. The Policy Guide and statute provide that if a practice is identified during a current examination and the examiner determines that the same practice was identified during a prior examination but is not corrected by the date of the current examination, the corrective action time period is retroactive to the date of the prior examination in which the violation was identified. This will be true even if there have been intervening examinations that did not review for compliance with the Act and Regulation Z. [see § 108(e)(3)(c)(I) found at 15 USC 1107(e)(3)(c)(I)]

6. *Are there any differences in application of the policy change when restitution situations involve open-end credit rather than closed-end credit?*

Yes. The Act provides different corrective action time periods for open-end and closed-end credit. The policy change applies to restitution situations involving closed-end credit. The corrective action time period for open-end credit covers the 24-month period preceding the date of the current examination, regardless of whether another examination intervenes during that period.

7. *What is the corrective action period with respect to terminated closed-end loans if an institution elects to comply voluntarily with the restitution provisions of the Policy Guide, absent a current examination?*

The Policy Guide states that “for terminated loans ... an adjustment will not be ordered if the violation occurred in a transaction consummated more than two years prior to the date of the current examination.” If an institution elects to comply voluntarily with the Policy Guide absent a current examination, the financial institution will have the option of either:

(1) Deferring reimbursement on any terminated loans until its regulatory agency conducts a current examination, or (2) Reimbursing on any terminated loans falling within the period prior to the discovery of the violation up to the date of the immediately preceding examination. If that time frame is in excess of two years, then reimbursement may be limited to the two-year period prior to the date of discovery of the violation.

8. *How will the Policy Guide apply when loans subject to reimbursement are acquired through a merger, consolidation, or in exchange for the assumption of deposit liabilities?*

In the case of a merger or consolidation, the receiving institution or the consolidated institution is liable for all liabilities of the merged or consolidating institutions, and the Policy Guide will apply.

In the case of loans acquired in exchange for the assumption of deposit liabilities, the Policy Guide will apply to the original creditor.

### **Calculating the Adjustment**

1. *How will disclosures containing information properly estimated under 12 CFR 226.5(c), 12 CFR 226.17(c), and Appendix D be treated for reimbursement determinations and computations?*

If an APR or finance charge is in error for any reason other than a properly made estimate, the determination of whether the error constitutes a reimbursable overcharge will be made using the estimated information as disclosed. At the creditor's option, reimbursement will be based on either:

- (1) The actual amount of loan advances, with consideration given to the amount and dates payments were actually made by the borrower; or
- (2) The disclosed amounts of time intervals between advances and between payments.

The basis selected shall be applied, using the lump sum or lump sum-payment reduction method (at the creditor's discretion), to all loans of the same type subject to reimbursement.

2. *If a creditor has failed to reflect private mortgage insurance premiums in the APR or finance charge disclosures, may the institution cancel the insurance after it first reimburses the customer with a lump sum payment to cover the period up to the date of the reimbursement?*

The creditor may elect to cancel the insurance if applicable laws and regulations are not violated. The effect of canceling the insurance will be to reduce the amount of the customer's future payments, as permitted by the "lump sum-payment reduction" method of reimbursement.

3. *If a creditor has failed to reflect private mortgage insurance premiums in the APR or finance charge disclosures and restitution is required, but the loan has been sold into the secondary market, how should reimbursement be made?*

The creditor is responsible for reimbursement, even if the loan has been sold. If its ability to cancel the insurance is limited by terms of the loan sales agreement, the creditor may make payments either to the consumer directly or (if it is agreeable to all parties) to the new owner of the loan. The new owner of the loan would make appropriate adjustments to the account so that the consumer receives the full benefit of the reimbursement.

4. *If the creditor failed to include any component of the finance charge (e.g., a loan origination fee) in the APR or finance charge disclosures, may the amount of reimbursement be reduced to account for fees excludable from the finance charge under 12 CFR 226.4(c) which are paid for by such finance charge components?*

If the borrower has not otherwise paid such excludable fees (e.g., title insurance fees) to the creditor or to a third party, reimbursement may be computed after first deducting from the finance charge those fees qualifying under 12 CFR 226.4(c).

5. *A transaction involves a loan with a term of 36 months, a payment schedule where the first 35 payments are calculated using a 30-year amortization and a balloon amount for the final payment. What tolerance should be used when applying the Policy Guide? One eighth of one-percent or one quarter of one-percent?*

The applicable tolerance is based on the amortization of the loan. Since the loan is completely amortized within a three-year period (i.e., the 36-month payment schedule), a tolerance of one quarter of one-percent should be used because the amortization period is less than ten years (15 USC 1607(e)(1)).

6. *How will the Policy Guide apply if a credit transaction has an interest rate or APR subject to increase and the variable rate feature was not provided on the disclosure statement?*

If the disclosure statement did not state that the rate would be subject to change, the borrower may be charged only the original APR disclosed. Reimbursement under the Policy Guide will apply only to the period of time in which the borrower made payments at an increased rate.

7. *How will the Policy Guide apply if a creditor disclosed that a rate will be prospectively subject to increase, but the APR disclosed or the finance charge disclosed or both were originally understated?*

The Policy Guide will apply as follows:

(1) If only the APR is understated, reimbursement will be required only for the period of time before the first scheduled change in rate under the variable rate feature in the contract.

The term "the first scheduled change in rate" refers to a date on which the rate will change to a level that is unknown or unpredictable at consummation. It does not include changes, such as step-rates, that are agreed upon before consummation.

For example, if the loan terms provide for a 9 percent rate for the first year and a 10 percent rate for the second year, followed by a variable-rate feature to be invoked at the beginning of the third year, reimbursement will apply only to the initial 24-month period. The lump sum-payment reduction adjustment method may be used, using two payment streams for the initial two-year period. Payments after the 24th month would not be affected by the adjustment.

(2) If only the finance charge is understated, reimbursement generally will be required for a period covering the entire life of the loan consistent with the following:

- If a prepaid finance charge was not included in the disclosed finance charge (such as a loan origination fee paid separately by the consumer at loan closing), the entire loan fee (less the applicable dollar tolerance) must be refunded as a "lump sum" payment.
- If, however, the loan fee was financed (included in the loan amount), the finance charge reimbursement may be prorated on a straight-line basis over the life of the loan and refunded under the lump sum/payment reduction method.

However, a finance charge adjustment will be required only for the period of time before the first scheduled change in rate if the error occurred solely because the interest component of the disclosed finance charge was based on either:

- (a) The interest to be earned before the first scheduled change in rate, or

(b) The interest to be earned assuming an initial discounted rate over the life of the loan.

For example, the interest component of the disclosed finance charge might incorrectly reflect only loan interest for the first year on a transaction with variable-rate changes scheduled annually. Alternatively, it might incorrectly reflect interest calculated only at an initial discounted variable rate for the full term of the loan. In either case, if the loan terms in the example provide that the variable interest rate is subject to change annually, the finance charge reimbursement will apply only to the initial 12-month period.

The adjustment may be prorated on a straight-line basis over the life of the loan. Reimbursement of prorated amounts covering the period of time after the first scheduled change in rate (after month 12 in this example) would not be required.

(3) If both the APR and finance charge are understated, normally the lump sum finance charge adjustment is compared to the lump sum APR adjustment as of the loan maturity date and the larger adjustment determines which disclosure error is subject to reimbursement. In the case of variable-rate transactions, however, the lump sum APR adjustment used for comparison is calculated for the period of time before the first scheduled change in rate in the manner indicated by (1) above and the finance charge adjustment is calculated in the manner indicated by (2) above.

For example, assume a loan in which both the APR and finance charge are understated on a 30-year, variable-rate loan that calls for rate changes annually. If both understatements were caused by the same failure to take into account a prepaid loan origination fee:

- The APR reimbursement amount is the lump sum value for a 12-month period, which is determined by using the lump sum/payment reduction method and appropriate reimbursement tolerances.
- The finance charge reimbursement amount is the lump sum value for a 360-month period, which is determined by subtracting the appropriate reimbursement tolerance from the amount of the loan fee.

The APR adjustment is compared to the finance charge adjustment to determine the larger of the two. In the example, the finance charge adjustment (and not the APR adjustment) would be reimbursable.

8. *If a creditor uses a simple interest rate, which is disclosed as the APR, to compute a monthly payment schedule, and the time interval from the date the finance charge begins to be earned to the date of the first payment is treated as if it were one month, even though that period is greater than one month and is not a "minor irregularity" under 12 CFR 226.17(c)(4), will the Policy Guide apply if the resulting application of the simple interest rate generates a higher finance charge than the one disclosed?*

The Policy Guide will apply if:

(1) The creditor's method used to compute the payment schedule, as previously described, is also used to compute the disclosed finance charge (i.e., the total of payments less the amount financed); and

(2) The final payment collected or scheduled under the contract (as generated by the application of the simple interest rate to the unpaid principal balance over the life of the loan) is greater than the one disclosed; and

(3) The finance charge resulting from the conditions described under (1) and (2) is understated.

9. *Will reimbursement be required for demand loans with disclosures based on a one-year maturity when the demand loan contract calls for periodic payments that will amortize the loan over a definite time period?*

Yes. A formal amortization schedule recorded in the demand loan contract is, under 12 CFR 226.17(c)(5), equivalent to an alternate maturity date, and disclosures based on the amortization schedule should be made, as opposed to the one-year disclosure.

10. *Will reimbursement be required on demand loans when:*

- (1) An alternate maturity date is disclosed and reflected in the contract, but the finance charge disclosure is based on one year?
- (2) There is no alternate maturity date disclosed or reflected in the contract, but the finance charge disclosure is based on a period of time less than one year?

In the first case, since there is an alternate maturity date in the contract, which is disclosed, the finance charge disclosure should have been based on that alternate maturity date, as required under 12 CFR 226.17(c)(5), not on the disclosure period to be used when the instrument has no alternate maturity date.

In the second case, the actual finance charge disclosure should have been based on a one-year period, as required by 12 CFR 226.17(c)(5), not on some period less than that required when the instrument has no alternate maturity date.

After considering appropriate tolerances, reimbursement will be required in both cases if:

- (1) The disclosed finance charge is less than the actual finance charge for the initial required disclosure period; and
- (2) The demand loan has been on the institution's books past the period for which finance charge disclosures were made.

Reimbursement will be calculated for the required disclosure period only. The amount reimbursed to the consumer is the difference between the finance charge actually paid and the finance charge disclosed (which may be increased by the applicable finance charge reimbursement tolerance).

If the demand loan has not been on the institution's books past the period for which finance charge disclosures were made (e.g., the finance charge was disclosed for a one-year period, but should have been disclosed for a five-year period, and only 10 months have elapsed), no reimbursement is required. However, if the institution takes no prospective corrective action (i.e., if it does not at least disclose in writing a refinancing of the original loan) and the loan remains on the institution's books past the period for which the original finance charge disclosures were made, reimbursement will be required as previously indicated.

Those concepts apply both to straight and variable rate demand loans whenever the disclosed finance charge is less than the actual finance charge after considering appropriate tolerances.

11. *How will the Policy Guide apply to violations of the early disclosure requirements of 12 CFR 226.19(a)?*

As a general rule, the Policy Guide will not apply to violations involving early Truth in Lending disclosures, but will apply to violations of the pre-consummation disclosures required by 12 CFR 226.17. However, if the creditor has provided erroneous early disclosures and has not made pre-consummation disclosures, the Policy Guide will apply to the erroneous early disclosures.

### **Methods of Adjustment**

1. *Must reimbursements resulting from understated finance charges always be made as a single "lump sum" amount?*

No. Reimbursements resulting from the creditor's failure to include prepaid finance charges in the total finance charge must always be refunded as a "lump sum" payment, but reimbursements resulting from failure to include finance charge components that accrue over time may be prorated on a straight-line basis (no time value) over the life of the loan and refunded under the lump sum/payment reduction method.

2. *Must a creditor use one reimbursement method consistently on all affected loans?*

No. The creditor's right to choose between the two methods (lump sum or lump sum/payment reduction) applies to each transaction.

3. *May a creditor apply a lump sum reimbursement to the consumer's loan balance on a loan requiring reimbursement instead of making a cash payment to the consumer?*

If the loan is a closed-end loan, the creditor must make a cash payment or a deposit into an existing unrestricted consumer asset account such as, an unrestricted savings, NOW, or demand deposit account. However, if the loan is delinquent, in default, or has been charged off, the creditor may apply all or part of the reimbursement to the amount past due, if permissible under law.

If the reimbursement involves an open-end account, the creditor must make a cash payment or a deposit into an existing unrestricted consumer asset account such as an unrestricted savings, NOW, or demand deposit account. However, on a case-by-case basis, the agencies may permit the creditor to credit the consumer's open account by the amount of the reimbursement if the consumer consents. Creditors should be aware that crediting open-end accounts might create credit balances subject to the requirements of 12 CFR 226.11. In addition, if the open-end account is delinquent, in default, or has been charged off, the creditor may apply all or part of the reimbursement to the amount past due, if permissible under law.

4. *If a transaction involves more than one consumer, to whom must reimbursement be made?*

The reimbursement is the property of, and is to be made to, the primary obligor in the credit transaction. If there is more than one primary obligor, reimbursement must be made jointly. If the primary obligor(s) is deceased, the payment should be made pursuant to the estate and unclaimed property laws of the state. If the creditor is unable to locate the primary obligor(s), after having at least mailed the reimbursement amount to the consumer's last known address, the amount of the reimbursement is subject to the unclaimed property laws of the state.

5. *How will the Policy Guide apply to residential mortgage transactions that have been assumed by a third party?*

Reimbursement will be made only to the original borrower and only to the extent of overcharges that occurred before the assumption if:

(1) A reimbursable violation is found on the original borrower's disclosure statement; and

(2) The original borrower is not released from liability on the loan. The original transaction will be considered terminated with respect to the original borrower on the date of the assumption and the rules for application of the Policy Guide to terminated loans will apply.

Reimbursement will be made to the original borrower for the period before the assumption occurred if:

(1) A reimbursable violation is found on the original borrower's disclosure statement; and

(2) The original borrower is not released from liability on the loan. However, in the event the subsequent borrower defaults and the original borrower must again assume payments on the loan, such payments will be based on the payment amount which would have been calculated under the lump sum-payment reduction method, at the time of reimbursement, had no assumption occurred.

If a required disclosure to a subsequent borrower contains reimbursable violations, that borrower shall be reimbursed for the period after the assumption occurred, based on the new disclosure.

**Non-Disclosure of the APR or Finance Charge**

1. *How will the Policy Guide apply to loans for which no disclosure statements are on file?*

If there is no evidence that the creditor furnished disclosures or if there is a preponderance of evidence that disclosures containing violations subject to reimbursements were destroyed before the record retention period expired, either violation will be treated as a failure to disclose the APR. The creditor will be given the opportunity to substantiate the claim that an accurate disclosure was made before final action is taken. The absence of compliance documentation will be viewed relative to known practices of the creditor for record retention and Regulation Z compliance.

2. *How will the Policy Guide apply if a creditor did not provide required disclosures to the consumer before consummation, but did supply them after consummation?*

If required disclosures were not provided before consummation of the transaction, the transaction will be viewed as having no APR disclosed and the Policy Guide will apply. If the creditor's failure to provide disclosures included the credit life, accident, and health insurance disclosures, the insurance premiums must be treated as finance charges.

3. *Will the Policy Guide apply when a creditor has disclosed the APR as "2% OP" to mean a fluctuating rate of two percent over the prime rate, or has disclosed similar prime rate terminology instead of the APR?*

If the disclosure statement (not the note) clearly provides the numerical value of the prime rate as it pertains to the credit transaction, as of the time disclosures are given to the consumer, that rate (the prime rate or 2% OP) will be considered to be the disclosed APR under the Policy Guide. If the prime rate is not provided on the disclosure statement, the transaction will be viewed under the Policy Guide as if no APR has been disclosed.

4. *Will reimbursement be required on demand loans when the variable rate feature has not been disclosed and the rate is increased?*

Yes. If the consumer has not been notified in writing of the rate change on or before the date of the change, reimbursement will be required if the financial institution has not made the variable rate disclosures.

Each time the rate is changed and the customer is not given written notification of the new rate, the rate change period(s) will be treated as if no APR had been disclosed, and the Policy Guide will apply. The rate on the most recent notification will serve as the contract rate.

**Improper Disclosure of Credit Life, Accident, Health, or Loss of Income Insurance**

1. *Are the credit insurance provisions of the Policy Guide applicable to terminated loans?*

Yes. The credit insurance provisions apply if such loans originated within the Policy Guide's corrective action period for terminated loans.

2. *How will the Policy Guide apply if the cost of credit insurance premiums is disclosed as a rate (e.g., as a percentage or in dollars and cents per hundred per month) in a closed-end transaction?*

Regulation Z permits creditors to disclose credit insurance premiums on a unit-cost basis in closed-end transactions by mail or telephone under 12 CFR 226.17(g), and in certain closed-end transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.



In all other closed-end credit transactions, however, the dollar amount of insurance premiums must be disclosed. If the premium cost in those cases is disclosed as dollars or cents per hundred or as a percentage, it will be treated as if no disclosure of the cost had been made and the Policy Guide will apply accordingly.

3. *How will the Policy Guide apply if:*

- (1) The creditor does not include premiums for credit life, accident and health insurance in the APR or finance charge disclosures; and
- (2) The creditor fails to disclose the optional nature of the insurance; but
- (3) The creditor has afforded the borrower the option of taking or refusing the insurance by checking a block or initialing a line opposite a statement similar to the following, both of which are disclosed in writing to the borrower: "I desire credit life, accident and health insurance" and "I do not desire credit life, accident and health insurance?"

In those cases, the Policy Guide will apply because the creditor has not disclosed to the customer in writing, as required by 12 CFR 226.4(d)(1)(i), that the credit life, accident and health insurance are optional.

4. *How will the Policy Guide apply if:*

- (1) The consumer is charged for credit life, accident and health insurance premiums; and
- (2) The creditor did not include the premiums in the APR or finance charge disclosures; and
- (3) The creditor disclosed the optional nature and cost of credit life insurance to the consumer in writing and the customer signed or initialed close to those disclosures; and
- (4) Either no affirmative statement indicating a desire to obtain the insurance was provided or the appropriate box or line was not checked or otherwise marked to indicate whether the customer did or did not desire the insurance?

If the disclosure provided a choice to the customer through statements such as "I desire the insurance" and "I do not desire the insurance" and neither choice has been marked to designate the customer's selection, the Policy Guide will apply because the creditor did not meet the requirements of 12 CFR 226.4(d)(1)(iii).

If no affirmative statement indicating a desire to purchase the insurance has been provided, and the customer has only signed or initialed near the optional nature statements or cost disclosures, the Policy Guide will apply because the creditor did not meet the requirements of 12 CFR 226.4(d)(1)(iii).

5. *How will the Policy Guide apply if:*

- (1) The creditor does not include premiums for credit life, accident and health insurance in the APR or finance charge disclosures; and
- (2) The creditor provides disclosures stating that the insurance is not required; and
- (3) The creditor provides the cost of each type of insurance, with a statement that the customer's signature will indicate a desire to purchase the insurance listed below and the customer signs once, below the cost disclosure, but does not initial each type of insurance desired?

If the disclosures clearly indicate that the customer, by signing where indicated, elects to purchase each type of insurance for which the cost has been provided, the Policy Guide will not apply. However, prospectively the creditor shall clarify such disclosures, by obtaining the customer's initials for each type of insurance selected, or by changing the manner in which the customer signs for credit insurance when more than one type is offered.

6. *If vendor's single interest (VSI) insurance is written in connection with a credit transaction, the insurance premiums are not included in the finance charge, and the creditor does not obtain a waiver of the right of subrogation from the insurer, is the resulting finance charge understatement subject to reimbursement under the Policy Guide?*

Yes. However, if the insurer has not exercised such right of subrogation and agrees to prospectively waive that right for outstanding loans, the Policy Guide will not apply to those loans.

**Obvious Errors**

6. *What are examples of Obvious Errors described in the Policy Guide?*

Consider a situation where the APR is disclosed correctly and the correct finance charge is \$600, no adjustment would be required if the amount of the disclosed finance charge is shown as \$60 or less. Likewise, if the finance charge is correctly disclosed and the correct APR is 18.568%, no adjustment would be required if the disclosed APR is shown as 1.